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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1232

CHARLES L. WOLFF, JR., WARDEN,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

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The respondent in this action was convicted in Nebraska State Court of first degree murder. The conviction was affirmed as reported in 188 Neb. 728, 199 N.W.2d 480 (1972). The federal district court granted habeas relief as reported in 388 F.Supp. 185 (D. Neb. 1974) and affirmed in 513 F.2d 1280 (8th Cir. 1975).

PRELIMINARY STATEMENT

Comes now the State of Georgia, by and through its Attorney General, at the request of the State of Nebraska, and files its brief amicus curiae in the above-styled cause on behalf of petitioner.

Amicus submits that the cause should be reversed for the reasons stated hereinafter.

QUESTIONS PRESENTED

Is there a constitutional requirement that evidence obtained by the State in violation of the Fourth Amendment be excluded from a criminal prosecution?

Is a federal habeas corpus challenge to a State conviction based on evidence obtained by the State in an alleged violation of the Fourth Amendment cognizable under 28 U.S.C. § 2254?

SUMMARY OF ARGUMENTS

This Court has made it clear that deterrence of State violations of the Fourth Amendment is the only constitutional justification for the application to the States of the exclusionary rule. The rule's effectiveness as a deterrent is so highly questionable and its costs so great that it should be abolished in its application to the States. To avoid the appearance that this Court is condoning Fourth Amendment violations, until the States act to find alternatives to the rule, this Court should continue excluding evidence where the constitutional infraction is substantial.

Regardless of the merits of the exclusionary rule, illegal state search and seizure cases should not be cognizable under federal habeas review. This Court has often emphasized that the purpose of habeas review is to prevent punishment of the innocent. Where a Fourth Amendment violation is alleged, the innocence of the prisoner is seldom alleged. State proceedings and the direct review of this Court are sufficient to properly dispose of serious Fourth Amendment issues.

ARGUMENT

At the present time, decisions of this Court require that evidence obtained by the State in violation of the Fourth Amendment not be used in a criminal trial against the defendant and that federal habeas review of State convictions be permitted on the ground of an alleged Fourth Amendment violation by the State. Presented to this Court is the question of the continued validity of these requirements.

I.

In Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. In Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), this Court was faced for the first time with the problem of whether the exclusion of evidence secured through an illegal search and seizure applied to the States. This Court held that the Fourth Amendment protection from arbitrary police intrusion on one's privacy applies to the States but "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." Wolf, 338 U.S. at 33, 69 S.Ct. at 1364.

This Court pointed out that most of the English-speaking world, including a large majority of the States, did not recognize the rule and also that there are other effective means of protecting oppressive police conduct, such as, public opinion and private action. In Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), this Court overruled Wolf by holding that the application of the exclusionary rule to the States is constitutionally mandated. As the dissent made clear, the majority made a sudden, unwarranted break with Wolf.

The main arguments this Court made in Mapp in extending the rule to the States are as follows: Between the time of the Wolf and the Mapp decisions, many States decided to adopt the exclusionary rule, and the federal government reformed the rule. Since the enactment of those reforms, the rule had not caused problems on the federal level. The exclusionary rule is the only effective deterrent preventing arbitrary police intrusion on one's privacy; it is the most important privilege of the Fourth Amendment.

Several of this Court's arguments in Mapp do not appear to be relevant to the issue of whether the extension of the exclusionary rule to the States is constitutionally required. Mapp (dissenting opinion). That a number of States adopted the exclusionary rule between the time of the Wolf and the Mapp

decisions is one example of this proposition. Whether the rule had been reformed or had not created problems on the federal level seems to have little or no bearing on the constitutional question.

The only argument of this Court in Mapp which clearly addressed itself to the constitutional question 1/ is basically this: The Fourth Amendment guarantee of freedom from arbitrary State invasion of one's privacy has but one effective protector, the exclusion of evidence illegally obtained by the police in a state prosecution; this rule is the most important privilege of that amendment. Thus, it appears that this Court is saying the reason the exclusionary rule has reached its constitutional proportions is because without it, Fourth Amendment guarantees are meaningless. It follows from that proposition that if the rule does not in fact protect Fourth Amendment freedoms, or if there are other reliable ways of protecting them, then the rule shrinks from its constitutional dimensions, which required its application to the State.

1/ In United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), this Court took the position that the sole justification for the exclusionary rule is deterrence of police misconduct.

The arguments against the utilization of the rule are strong. Empirical research indicates that it is a failure as a deterrent. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). Oaks concludes that the rule has no effect on the vast majority of police work. There are several reasons for the failure of the rule. There is no direct sanction placed on the officer by the rule, his stake is actually no greater than that of the public. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (dissenting opinion). Irvine v. California, 347 U.S. 128, 74 S.Ct. 381 (1954). Police lack the time, inclination, and training to understand the complexities of appellate decisions in this area, and the long lapse between the time of the policeman's illegal act and the appellate court's order to release the defendant greatly diminishes any educational effect. Bivens. The rule does not protect innocent victims of illegal police searches. Irvine. The costs of the exclusionary rule are great. Perfectly reliable evidence, which often establishes guilt well beyond a reasonable doubt, is made unavailable to the prosecution. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (concurring opinion). Society is deprived of a remedy against a wrongdoer, Irvine, supra; the wrongdoer's release encourages him to continue subjecting society to his criminal behavior.

Another great cost of the rule is that public respect for the law is destroyed by the spectacle of criminals escaping punishment because of what often appears to be a mere technicality. Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L.C.&P.S. 225 (1961). In Mapp this Court worried about breeding contempt for the law if the government were allowed to break its own rules; it appears now that the operation of the rule itself may be creating contempt for the law.

An important purpose of punishment in our criminal justice system is to deter illegal behavior. Occasionally, in the course of enforcing the criminal laws, a police officer will violate the Fourth Amendment. In such cases, the government has two important interests to protect. One centers on the original crime, the other on the Fourth Amendment violation. Both acts are illegal, there are laws which proscribe both and demand appropriate punishment. But it is not uncommon for the original crime to be very serious while the Fourth Amendment infraction is insubstantial. 2/

2/ The case sub judice perfectly illustrates this point. The prisoner wantonly murdered a policeman. The police attempted to comply with the Fourth Amendment. Not until federal habeas review was the search warrant found defective.

The State wishes to deter both types of actions, but, of course, has a greater interest in deterring the much more serious infraction. Most certainly under our constitutional system there is a strong need to deter state violations of individual's privacy. However, a means of so doing which may substantially interfere with deterring all other categories of crimes, while not deterring Fourth Amendment infractions, seems alien to sound reasoning. Too often the importance of society's interest in deterrence of violent crimes has been unwarrantedly disregarded because an overzealous policeman has violated Fourth Amendment mandates. It is not inconsistent whatsoever with an upmost respect of constitutional values for a State to wish to deal directly with both the original law breaker and the policeman who subsequently breaks search and seizure commands. In fact, it may be better to deal with both directly. Only by so dealing can action be taken against both that will deter both types of illegal activity. The present rule has the unfortunant consequence of letting both offenders escape.

The majority in Mapp contended that "without that rule the freedom from state invasions of privacy would be [virtually nonexistent]," 367 U.S., at 655, 81 S.Ct. at 1684. In fact, Fourth Amendment violations have rarely been a serious problem in this country. Even if the exclusionary rule had never been adopted,

it is highly unlikely that repressive police action would be other than very rare; while the rule has been ineffective as a deterrent, there are adequate safeguards for our constitutional freedoms. Even assuming for the moment that the rule is a deterrent, all it may reasonably be expected to deter is action wherein the police are seeking evidence to be used in a criminal prosecution. But there is a wide area of police activity which is not aimed at gathering evidence for criminal trials. If the exclusionary rule were the only means of preventing State invasion of privacy, illegal searches and seizures would be rampant. In fact, State and local governments are responsive to their citizens. The political process is fully adequate to prevent illegal police activity from becoming a problem. Furthermore, since the time of Mapp many social changes have been made which assure minorities a strong voice in the political process. Civil rights legislation, greater involvement in the political process on the part of minorities, and change in the attitude of the majority work against police harassment of minorities. Except when a person wants to have perfectly reliable evidence excluded from his criminal prosecution, it is rare that a charge is made of an illegal search and seizure. Where on occasion an illegal search is made of an innocent person, the response from the public and officials has been of outrage, not complacency. The effect of this response on the police is to discourage all illegal activity for fear that the next violation will also involve an innocent person and the consequent public outrage.

Thus, it appears that time has proven the justifications underlying the Mapp opinion to be faulty. Because the exclusionary rule does not in fact protect Fourth Amendment guarantees of freedom from arbitrary State invasions of privacy, the rule loses the justification which was thought to require by constitutional mandate that it be extended to the States. The costs of the rule to society emphasize the need of States to be free to make their own reasoned determinations in this matter.

In his dissenting opinion in Bivens, supra, Mr. Chief Justice Burger worried that a sudden abandonment of the exclusionary rule would be misinterpreted by police to mean that any sort of illegal Fourth Amendment activity on the part of police is now acceptable. Thus, he expressed unwillingness for the Court to abandon the rule, but suggested that creation by legislation of an effective remedy against unlawful conduct by government officials would be an acceptable replacement for it. If it is assumed that the rule is not constitutionally required, but must stand until an acceptable replacement is found, it would appear that there is at least some room for flexibility in its application. Indeed, many federal courts have thought of the rule as "simply a prophylactic device intended generally to deter." See Kaufman v. United States, 394 U.S. 217, at 224, 89 S.Ct. 1068, at 1073, 22 L.Ed.2d 227 (1969).

Where it finds that there is a need to protect certain constitutional values, the Court has shown a willingness to develop rules of exclusion of evidence obtained by a State in violation of those values, rather than to wait for Congress or the States to act. Mapp, supra; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In Miranda, the Court set out certain procedural safeguards a State must follow if a defendant's statements are to be allowed in evidence against him. The holding in Mapp does not outline in the same detail as Miranda the precise routine police must follow to prevent exclusion of certain evidence. Rather, by treating "vastly dissimilar cases as if they were the same," Bivens, 403 U.S. at 419, 91 S.Ct. at 2016 (dissenting opinion), the Court excludes all evidence which is obtained through a State infringement of the Fourth Amendment, whether substantial or otherwise. Clearly, the Court could adopt procedures which would discriminate between substantial and minor constitutional infringements. The American Law Institute has drafted a workable procedure which could serve as a model for the Court's formulation of rules in this matter while the States and Congress decide whether to take action. A.L.I., Model Code of Pre-Arraignment Procedure, §§ 290.2(2) (Proposed Official Draft No. 1, 1972).

It provides as follows:

"A motion to suppress evidence shall be granted only if the court finds that the violation upon which it was based was substantial, or if otherwise required by the Constitution of the United States or of this State. In determining whether a violation is substantial the court shall consider all the circumstances including:

"(a) The importance of the particular interest violated;

"(b) The extent of deviation from lawful conduct;

"(c) The extent to which the violation was willful;

"(d) The extent to which privacy was invaded;

"(e) The extent to which exclusion will prevent violation of this Code;

"(f) Whether, but for the violation, the things seized would have been discovered;

"(g) The extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him."

It would seem reasonable that evidence obtained where the police in good faith tried to comply with the dictates of probable cause and the warrant requirements need not be excluded. Exclusion of evidence where police have acted in bad faith should be sufficient to remind police that the Fourth Amendment is still viable.

II.

There has been a great deal of development in the law of habeas corpus in the last two decades. The concurring opinion in Schneckloth, supra, relies on the works of two respected scholars in tracing the common law development of habeas corpus. 3/ The common law of habeas corpus at the time of the adoption of the Constitution did not allow a court disposing of a habeas corpus petition to go behind the conviction for any purpose other than to verify the formal jurisdiction of a superior court of general jurisdiction, where a person had been convicted by that court. In Ex Parte Watkins, 3 Pet. 193 (1830), Chief Justice Marshall recognized this principle. Not until the passage of the Habeas Corpus Act in 1867 did federal

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3/ Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Habeas Corpus, Oaks, Legal History in the High Court - 64 Mich. L. Rev. 451 (1966).

habeas review become available to State prisoners, and even this Congress intended to remain within the historical parameters of habeas corpus. Schneckloth.

> "Much, of course, has transpired since that first Habeas Corpus Act. See Fay v. Noia, 372 U.S. at 449-463, 83 S.Ct., at 854-862. (Harlan, J., dissenting). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction, Andrews v. Swartz, 156 U.S. 272, 15 S.Ct. 389, 9 L.Ed. 422 (1895); In re Moran, 203 U.S. 96, 27 S.Ct. 25, 51 L.Ed. 105 (1906), to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries. But recognition of that reality does not liberate us from all historical restraint. The historical

> evidence demonstrates that the purposes of the writ, at the time of the adoption of the Constitution, were tempered by a due regard for the finality of the judgment of the committing court. This regard was maintained substantially in tact when Congress, in the Habeas Corpus Act of 1867, first extended federal habeas review to the delicate interrelations of our dual court systems." Id., 412 U.S. at 255-256, 93 S.Ct., at 2062.

In Fay, supra, this Court did away with the rule that a person could not challenge his conviction collaterally even after the Government admitted his innocence. Yet, as Mr. Justice Black in a dissenting opinion stated, "[t]he Court's opinion in Noia shows, from beginning to end, that the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant." Kaufman, supra, 394 U.S. at 235-236, 89 S.Ct. at 1079. The concurring opinion in Schneckloth gives some approval to the recent evolution of habeas corpus so long as the person bringing the writ raises a constitutional claim bearing on his innocence.

In Kaufman, supra, this Court granted habeas corpus relief to a prisoner, who admitted his guilt but maintained that he was unjustly detained because evidence used in his trial had been obtained in violation of the Fourth Amendment. As pointed out in its dissent, and the concurring opinion in Schneckloth, this clearly went well beyond any possible justification for the use of habeas relief. Thus, the reasoning which led to extending habeas relief beyond its historical bounds provides no justification for its use to challenge a person's conviction because it was based in part on evidence obtained by an allegedly illegal search and seizure.

A federal court may entertain an application for a writ of habeas corpus from a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). But as the concurring opinion in Schneckloth indicated, Congress did not intend "every allegation of a constitutional violation to afford an appropriate basis for collateral review," 412 U.S. at 272, 92 S.Ct. at 2070. Fay, supra, acknowledges that the judge has discretion in determining whether law and justice require collateral relief. The innocence of the prisoner is one important factor to weigh in the exercise of this discretion. Kaufman, supra (dissenting opinion).

When there is a claim of an illegal search and seizure, without a claim of innocence, federal habeas review of a state conviction should not be permitted. Schneckloth, supra. (concurring opinion). A catalogue of the values to be protected by refusing review in such cases emphasizes this point. "They include (i) the most effective utilization of limited judicial resourses, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded. Id., 412 U.S., at 259, 93 S.C.t, at 2064.

There is a growing burden of litigation being placed on the federal judicial system. See Schneckloth, 412 U.S. at 260, 93 S.Ct. at 2065, fn. 14. A federal habeas claim has generally been through several state courts, whose judges are as competent to make just decisions as are federal judges. Such unnecessary review overloads the limited resources of the federal courts. Wise judicial administration demands that once Fourth Amendment claims have had a chance to be litigated in state courts and this Court on direct review and state habeas review, they should not be subject to federal collateral attack.

There must be a point at which criminal litigation comes to an end. Our criminal justice system is dedicated to the proposition that an innocent man should not be punished unjustly, and there are numerous safeguards to

ensure this. The present habeas theory seems to be based on two related and erroneous propositions. First, the safeguards of fair trial are generally inadequate to protect the innocent; second,there is always a strong possibility that several tiers of state court have through inadvertance or design allowed an innocent man to be punished. Regardless of the dubious merits of these two propositions, in a habeas claim based on a Fourth Amendment violation, the question of innocence is rarely raised. There is a social need in punishing the guilty for both deterrent and rehabilitative purposes. And the sooner the guilty realizes that the decision is final, the better these purposes may be accomplished. Except in the rare instance that there is a legitimate claim of innocence accompanying a habeas petition based on illegal Fourth Amendment activity, the finality interest calls for denial of habeas review.

This court is the ultimate protector of the Constitution. In its zeal to protect other values, it must not overlook the importance of our system of federalism. In Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A.J. 943 (1963), Mr. Justice Harlan points out that the diffusion of power among the branches of the federal government and the States by the Constitution was done purposefully to ensure that the dangers inherent in too greatly centralized a government would be avoided. Holding an important position within this system is the idea of sovereignty of the States. An exception is that State

Courts are subject to federal review of federal questions. Where there is a possibility that a person has been unjustly convicted and although innocent is being incarcerated because of the misapplication of federal law, there may indeed be strong reasons for habeas review. But where, as with a Fourth Amendment claim, innocence is not alleged, the justification for interfering with a State's sovereignty disappears. "In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement." Mapp, 367 U.S. at 681, 81 S.Ct. at 1706 (Harlan, J., dissenting).

Regardless of the merits of the exclusionary rule on initial trial and appeal, its benefits on collateral review are negligible. Schneckloth, supra (Concurring opinion): its belated application years after the Fourth Amendment violation is void of deterrence. "Serious Fourth Amendment infractions can be dealt with by state judges or by this Court on direct review." Id., 412 U.S. at 269, 93 S.Ct., at 2069. Therefore, there cannot be justification for habeas review where the only ground claimed for release is an illegal search and seizure of evidence used in the trial.

CONCLUSION

For these reasons, Amicus respectfully urges this Court to reverse the holding of the Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, G. THOMAS DAVIS, one of the counsel for Amicus Curiae, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served a true and correct copy of the Brief of Amicus Curiae, by depositing same in United States mail, properly addressed with sufficient postage prepaid, upon the following:

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